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In The

Supreme Court Of The United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN JEWISH COMMITTEE, PEOPLE FOR THE AMERICAN WAY, THE UNION OF AMERICAN HEBREW CONGREGATIONS, AND AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court should apply the "no endorsement of religion" test in this case and not some other standard of review. The endorsement test, with its prohibition on government imprimatur of religion, represents the most appropriate analytical standard for reviewing the constitutionality of private speech in public areas. The no-endorsement principle is thoroughly consistent with our constitutional heritage and has been a recurring theme in church-state jurisprudence.

The court of appeals' holding below represents a rigid, *per se* rule that government endorsement of religion can never occur in a public forum so long as private speech is involved. This holding is inconsistent with the Court's public forum analysis which allows the state to show a narrowly tailored compelling interest in order to restrict protected speech. The holding also conflicts with the endorsement test, which requires courts to examine the entire context of the display to see whether endorsement has occurred.

Considering the entire context of the display of the Klan cross at Capitol Square, the Court should hold that the state would create the appearance of endorsing the religious message of the cross by allowing its display. The cross stands unattended and unaccompanied by any neutralizing symbols at a highly significant location closely associated with state

government. A reasonable observer would perceive that the cross occupies this special location with the support and approval of the government. Finally, the long-term display of the cross at this location invites religious divisiveness, a persistent concern of the Establishment Clause.

Each of the *amici* on this brief vigorously supports free exercise of religion for people of all faiths and has so advocated in numerous cases before this Court. Each knows too, however, that there is no religious need to place sacred symbols of any faith in public areas. There is abundant private property available for the public display of sacred symbols of all faiths - churches, synagogues, mosques, religious schools, store fronts, private homes and lawns.

When any group demands as a matter of right to place its sacred symbol in a public area, it does so because it seeks to send a message and to make a symbolic statement, i.e., unless display of this sacred symbol is permitted in a public area, it is not *official* enough. That is precisely our constitutional point. Sacred symbols of any faith do not need, and should not receive, official endorsement, express or implied.

As such, the question here is whether in certain situations, the Establishment Clause can serve as a bar to private speech in a public forum. The issue of whether the state may distinguish between types of religious symbols the menorah and the cross - is not in doubt. Government may not prefer one religion over another; nor may it define one religion's symbol as cultural or seasonal in order to provide it with special access. *Amici* contend that the display of the menorah and the cross under the circumstances of this case are equally unconstitutional.

ARGUMENT

I. THE "NO ENDORSEMENT OF RELIGION" TEST IS THE APPROPRIATE STANDARD FOR REVIEWING THE CONSTITUTIONALITY OF RELIGIOUS DISPLAYS IN PUBLIC FORA.

A. The "No Endorsement of Religion" Test Is Appropriate for Considering Issues of Religious Speech in Public Areas.

The Court should apply the "no endorsement of religion" test for reviewing the constitutionality of private religious speech in public areas. The test, with its prohibition on governmental imprimatur of religion, reflects "the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and in the judgment) (*quoting Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)). No other analytical standard so closely captures that crucial aspect of nonestablishment that prohibits government from aligning its practices and policies with religion, from affirmatively favoring, disfavoring, or promoting one religion or religion in general, or from unintentionally "convey[ing] a message that religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

The endorsement test is the most appropriate standard for reviewing issues of religious symbolic speech in public areas. The endorsement test had its first articulation and its

clearest application in the Court's two religious display cases. *Allegheny*, 492 U.S. at 592-94; *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring). As Justice O'Connor observed recently, while different categories of Establishment Clause cases may call for separate analytical approaches, those cases concerning government involvement with religious speech "require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion." *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring in part and in the judgment). This authority instructs its use here. *Allegheny*, 492 U.S. at 592-94 ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of endorsing religion...."); *accord Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2148 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226, 247-48 (1990).

More than precedent calls for the application of the endorsement test in this case. Because messages communicated through symbols can be powerful, but at the same time imprecise, the potential for official endorsement arises whenever free-standing religious symbols are erected on public areas closely associated with government.[1] Unlike other analytical standards, the endorsement test seeks to address "the myriad subtle ways in which Establishment Clause values can be eroded" that are often difficult to

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[1] According to one commentator, people "are notably more sensitive to images than to ideas, more responsive to stereotypes than to logic, to the concrete symbol than to the abstraction." Max Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290, 1293 (1937).

articulate but are nevertheless real to religious nonadherents. *Allegheny,* 492 U.S. at 591. Endorsement also acknowledges the prominent role symbolism plays in both religion and government and the "'highly charged atmosphere' that develops when the two are intertwined." William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351, 355 n.23 (1991).[2] No other test addresses those Establishment Clause violations that take place in the transitional zone between government and private speech and action. *Allegheny,* 492 U.S. at 600-01 ("Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message.").[3] Finally, the endorsement test's focus on the particular context of the challenged speech is especially appropriate for religious display cases because the "meaning ascribed to symbols is often a function of the context in which the particular symbol

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[2] "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones." *West Virginia Board of Educ. v. Barnette,* 319 U.S. 624, 632 (1943).

[3] "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrine." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985).

arises." William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495, 538 (1986).

Conversely, a standard of formal neutrality or one limited to official attempts at proselytizing ignores the subtle power of symbolism and will not prevent the government from lending its "power [and] prestige" to a religious group or from affiliating itself with a religious dogma. *Engel v. Vitale,* 370 U.S. 421, 429 (1962); *Allegheny,* 492 U.S. at 604-09. A lesser standard that would allow government use of religion, short of actual proof of intent to coerce belief or advance religion, would open the door to myriad subtle if not overt acts of religious preference. Such a result would be inconsistent with the core purpose of the Establishment Clause. As Justice O'Connor remarked in *Allegheny,* "the endorsement test asks the right question about government practices challenged on Establishment Clause grounds including challenged practices involving the display of religious symbols." *Id.* at 628 (O'Connor, J., concurring). The test should be applied in this case.

B. The Prohibition on Government Endorsements of Religion Represents a Core Principle of the Establishment Clause.

Endorsement of religion is "a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny,* 492 U.S. at 592. As early as *McCollum v. Board of Education,* 333 U.S. 203, 209 (1948), and again later in *Engel v. Vitale*, 370 U.S. at 431, 436, this Court identified

state endorsements of religion as an evil the Establishment Clause was designed to prevent.[4]

But this well-founded concern, based on the historic propensity of government toward religious endorsements, predates the Court's modern church-state decisions. According to a leading commentator, state endorsement of religion was equated with "an establishment in the political understanding of the Founder's generation . . .." Douglas Laycock, *Noncoercive Support for Religion: Another False Claim about the Establishment Clause,* 26 Val. U.L. Rev. 37, 42 (1991). Thomas Jefferson and James Madison condemned all forms of endorsement as being inconsistent with principles of nonestablishment. Both leaders believed government lacked the authority (both legal and moral) to make any statements on behalf of religion, advisory or otherwise.[5] Madison wrote that

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[4] *See McCollum,* 333 U.S. at 209 (condemning "the close cooperation between the school authorities and the religious council in promoting religious education."); *Engel,* 370 U.S. at 429 (condemning state actions that emplace an "official stamp of approval" on religion or lend government "power and prestige" to a particular religious belief.).

[5] *See* Jefferson's letter of January 23, 1808, to Rev. Samuel Millar where Jefferson wrote that to issue even unofficial religious proclamations would "indirectly assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from." John F. Wilson and Donald L. Drakeman, eds., Church and State in American History 79 (1987).

Similarly, in 1832 Madison responded to a pamphlet written by Rev. Jasper Adams, nephew and cousin of presidents, that asserted that government had an obligation to promote

government declarations on religion "seem to imply the erronious (*sic*) idea of a national religion." Madison opposed even advisory declarations that evoked no more than a "universal" sense of "devotion to the God of all," stating that the "tendency of the practice, [is] to narrow the recommendation to the standard of the predominant sect." Madison recognized that "[i]n a nation composed by various sects, some alienated widely from others," religious endorsements would undermine the equality that the Constitution sought to ensure.[6]

During the final two decades of the eighteenth century, most states dismantled their religious establishments, doing away with the tax support and ministerial privileges afforded official churches. Initially, a few states sought to retain the legal recognition of Christianity under their new constitutions but quickly dropped such arrangements because they conflicted with the developing understanding of nonestablishment.[7] As Professor Laycock states, "the

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Christianity because the people "had retained the Christian religion as the foundation of their civil, legal and political institutions." Madison unequivocally rejected Adams' thesis, arguing for "an entire abstinence of the Government from interference [with religion] in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others." Letter to Rev. Jasper Adams, n.d., *id.* at 80-81.

[6] James Madison, "Detached Memoranda" (1832), in Robert S. Alley, ed., James Madison on Religious Liberty 93 (1985).

preponderance of evidence is that opponents of establishment were unwilling to accept even a bare endorsement of the established churches." *Noncoercive Support for Religion*, 26 Val. U.L. Rev. at 42.

Admittedly, the understanding that nonestablishment prohibits government endorsements of religion was not always followed. The history of American political discourse and government action is rife with examples of official endorsements of religion, in most instances endorsements of the prevailing religious hegemony. Throughout the nineteenth century public officials and political leaders tied America's identity and purpose to Protestant Christianity while some sought even to have the country declared a "Christian Nation." *See* Morton Borden, Jews, Turks, and Infidels 54-74, 98-129 (1984).[8] Justice Joseph Story, writing for the Court in 1844,

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[7] In 1784, Virginia passed an act incorporating the Protestant Episcopal Church that granted the church no more than official recognition. Even though the law afforded the church no legal authority or financial benefit, it was repealed three years later after massive protest. A similar example of an early endorsement is found in the South Carolina Constitution of 1778, which declared that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." That provision was removed from the 1790 constitution. Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 67, 81 (rev. ed. 1964); Laycock, *Noncoercive Support for Religion*, 26 Val. U.L. Rev. at 42-45. According to Professor Laycock, "the principle surviving element of these establishments was endorsement of a preferred religion, and those endorsements were unacceptable to opponents of establishment." *Id.* at 42.

[8] In 1858, Iowa Governor Lowe issued a proclamation declaring a day of thanksgiving, stating: "Praise [God] for giving

acceded to the popular view that Christianity was "part of the common law," arguing that "its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against . . .." *Vidal v. Girard's Executors,* 2 How. 127, 198 (1844). Some antebellum judges declared that the duty of government went beyond simply protecting Christianity from all challenges to encouraging citizens in their religious obligations.[9] The perspective that

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this whole land so largely of his Spirit, by which the faces of multitudes have been turned heavenward. Praise him for the Christian's faith, and the spread of our holy religion." David McAllister, Christian Civil Government 107 (1927).

In 1894, Senator Frye of Maine proposed that the Preamble to the Constitution be amended to include an express recognition of God, to wit:

> We the people of the United States, devoutly acknowledging the supreme authority and just government of Almighty God in all affairs of men and nations; greatful to Him for our civil and religious liberty, and encouraged by the assurances of His Word to invoke His guidance as a Christian nation, according to His appointed way, through Jesus Christ, in order to form a more perfect union . . ..

26 Cong. Rec. 1374 (Jan. 25, 1894).

[9] In upholding a conviction for violating a Sunday law, the Pennsylvania Supreme Court stated that "[i]t is of the utmost moment, therefore, that [people] should be reminded of their religious duties at stated periods." *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 51 (Pa. 1817); *accord Lindenmuller v. The People*, 33 Barb. 548, 560-61 (N.Y. 1861); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 402-03 (Pa. 1824);

government should be aligned with Christianity reached its apex with the Court's *Holy Trinity* decision where Justice David Brewer declared "this is a Christian nation." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471 (1892).

Notwithstanding such religious pronouncements, by the late nineteenth century an increasing number of judges and public officials came to recognize that any official favoritism toward religion exceeded government authority and violated notions of religious equality. Judge Alfonzo Taft of the Ohio Superior Court wrote in 1870:

> No sect can, because it includes a majority of a community or a majority of the citizens of the State, claim any preference whatever. . . . The State protects every religious denomination in the quiet enjoyment of its own mode of public worship. . . . It is, therefore, an entire mistake, in my opinion, to assert, that the Protestant Christian religion has been so identified with the history and government of our State or country.[10]

Pearce v. Atwood, 13 Mass. 324, 348 (1816); *People v. Ruggles,* 8 Johns. 290, 295-96 (N.Y. 1811). Story argued in his Commentaries on the Constitution of the United States that it was "the especial duty of government to foster and encourage [Christianity] among all the citizens and subjects." 3 Commentaries 603 (4th ed. 1873).

[10] The Bible in the Public Schools – Arguments in the Case of John D. Minor versus the Board of Education of the City of Cincinnati 414-15 (1870). *See also People ex rel. Ring v. Board of Educ.*, 92 N.E. 251, 255 (Ill. 1910) ("The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in

This Court too has since repudiated earlier statements of religious favoritism as being inconsistent with the Establishment Clause. *Lee v. Weisman*, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting) (criticizing *Holy Trinity*); *Wallace,* 472 U.S. at 52-53 (criticizing Justice Story's Commentaries); *Lynch,* 465 U.S. at 718 (Brennan, J., dissenting) (criticizing *Holy Trinity*). As the Court stated in *Allegheny,* 492 U.S. at 605:

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, *e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). . . . There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command.

Accordingly, the no-endorsement principle is thoroughly consistent with our constitutional heritage and has been a recurring theme in church-state jurisprudence. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 106-

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considering men's rights."); *Board of Educ. v. Minor*, 23 Ohio St. 211, 248 (1873) ("[Christianity's] essential interests lie beyond the reach and range of human governments. . . . [N]o government is at all adapted for producing, perfecting, or propagating a good religion."); *accord Knowlton v. Baumhover*, 166 N.W. 202, 212 (Iowa 1918); *State ex rel. Freeman v. Scheve*, 93 N.W. 169, 170 (Neb. 1903); *State ex rel. Weiss v. Dist. Board of School Dist. No. 8*, 46 N.W. 967, 978 (Wis. 1890).

107 (1968); *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *Engel*, 370 U.S. at 429, 436. The test has appropriately been applied as a separate standard for constitutional adjudication for the past ten years. *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248-52; *Allegheny*, 492 U.S. at 593-94; *Texas Monthly*, 489 U.S. at 8-9, 15; *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *School Dist. v. Ball*, 473 U.S. at 389-90; *Wallace v. Jaffree*, 472 U.S. at 56. As articulated by the Court, the endorsement test protects the core purpose of the Establishment Clause by ensuring that government remain truly neutral on religious matters, neither approving nor disapproving of religion. *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring).[11] The endorsement test has survived careful scrutiny[12] and continues to represent the most appropriate standard for determining

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[11] As discussed in part IIA, *infra*, this form of neutrality is neither formal nor passive but requires government to take affirmative steps to ensure that its actions have not unintentionally created the perception of endorsement of religion. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

[12] *See* Laycock, *Noncoercive Support for Religion*, *supra*; Marshall, *The Concept of Offensiveness*, *supra*; Joseph Richard Hurt, *The Use of Endorsement in Establishment Clause Analysis — The Key to a New Consensus*, 8 Miss. C. L. Rev. 1 (1987); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 Notre Dame L. Rev. 151 (1987); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. Rev. 1049 (1986); Marshall, *"We Know It When We See It," supra*; *contra* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987).

when government actions have crossed the line from permissible accommodations of religion into impermissible favoritism or promotion.

II. CONTRARY TO THE DECISION OF THE SIXTH CIRCUIT, ENDORSEMENT OF RELIGION CAN OCCUR IN A PUBLIC FORUM.

A. The Adoption of a Blanket Rule Upholding Private Religious Speech in a Public Forum Conflicts with this Court's Public Forum Holdings as well as Its Decisions Concerning Endorsement of Religion.

The court of appeals below held that "the Establishment Clause forbids only religious speech sponsored by the government, so 'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" Pet. App. A9 *(quoting Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (emphasis in original)). Thi holding represents a rigid, *per se* rule that government endorsement of religion can never occur when private speech takes place in a public forum. Under this holding, a finding of endorsement in a public forum is impossible even though compelling evidence may exist that a local government intends to promote a private religious message or, because of past, direct government involvement with the religious speech, a reasonable observer would perceive government approval of the religious message. So long as the actual speech is by a private individual and takes place in a public forum, then the existence of any government endorsement of that speech becomes irrelevant. In essence, the public forum "trumps" the Establishment Clause, regardless of other factors indicating

religious endorsement.[13] This holding conflicts with the

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[13] That the Sixth Circuit's holding amounts to a rigid, *per se* rule is made clear in its *Americans United* decision. Although the court denied that its holding means the public forum will always "trump" the Establishment Clause, the court also indicated that the sole consideration in such cases was whether the public forum label may have been misapplied. "[I]f such additional facts are not forthcoming, and evidence indicates that an area actually is a traditional public forum, then private groups may express a religious message without a reasonable observer inferring public support of the message." 980 F.2d at 1553; *see also Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993) ("It is settled law in this circuit that a city does not violate the Establishment Clause by permitting a private organization, during the observance of Chanukah, to erect a large unattended menorah in a public square that is a traditional public forum."). These statements are unequivocal.

Two other circuits have made similar broad holdings indicating the application of a blanket rule. In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1393 (11th Cir. 1993), the Eleventh Circuit wrote: "Precisely because the religious speech is communicated in a true public forum, however, the state, by definition, neither endorses nor disapproves of the speech." In *Doe v. Small*, 964 F.2d 611, 619 (7th Cir. 1992), the Seventh Circuit stated: "Moreover, the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government." *Contra Kreisner v. City of San Diego*, 1 F.3d 775, 782-86 (9th Cir.), *cert. denied*, 114 S. Ct. 690 (1994); *Smith v. Abemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir.), *cert. denied*, 496 U.S. 926 (1990).

Court's endorsement decisions and is equally inconsistent with its public forum analysis. The Court should expressly reject this blanket rule for the reasons stated below.

1. Considering the Free Speech issue first, a finding that protected speech takes place in a public forum does not preclude consideration of potential state interests that may require government to restrict that speech. Under public forum analysis, once the speech has been identified as occurring in a public forum, the burden shifts to the government to come forward with a narrowly tailored compelling interest to justify its action. *ISKCON v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Therefore, the mere fact that protected speech has occurred in a public forum does not mean that a compelling interest cannot exist.

This Court has expressly held that the interest of the state in avoiding Establishment Clause violations may constitute a compelling interest, thereby "justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel*, 113 S. Ct. at 2148 (*relying on Widmar v. Vincent*, 454 U.S. at 271). If this statement has meaning, it is that the avoidance of an endorsement of religion (which may occur through the unattended display of religious symbols at government buildings, *see Allegheny*, 492 U.S. at 598-602) can serve as a compelling interest justifying a restriction on religious speech. If government endorsement cannot constitute a compelling interest under free speech analysis, then the remainder of the *Lamb's Chapel* and *Widmar* opinions – where the Court examined the facts and found no compelling establishment concern in either case – are superfluous. Whether sufficient endorsement exists to

constitute a compelling interest will depend on the facts of each case. *Allegheny,* 492 U.S. at 598. But the clear rule from the public forum cases is that "forum analysis is not completed merely by identifying the government property at issue." *Cornelius,* 473 U.S. at 803. But this is exactly what the Sixth Circuit has done by holding that once private religious speech takes place on a public forum, no appearance of endorsement can be seen to have occurred. Pet. App. A9.

2. The Sixth Circuit's ruling runs afoul of this Court's endorsement holdings as well. As addressed above, impermissible endorsement of religion does not occur solely through the government's own speech but may also occur through "the government's support and promotion of religious communication by religious organizations." *Allegheny,* 492 U.S. at 600-01 ("Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."); *accord School Dist. v. Ball,* 473 U.S. at 389. In both *Lamb's Chapel* and *Widmar*, the Court, after identifying the presence of private speech in what were arguably public fora, still examined the degree of government sponsorship to see whether endorsement had occurred. *Lamb's Chapel*, 113 S. Ct. at 2148; *Widmar,* 454 U.S. at 271-75. Thus, the mere fact that private speech is involved begs the question of whether the state has endorsed that speech.[14] In addition, because the identity of a public forum is not always self-

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[14] The Court's statement in *Mergens,* 496 U.S. at 250, that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," does not contradict this point but reaffirms the potential for government endorsement of private religious speech under circumstances such as those in this case.

evident and frequently turns on interpretations of law as well as facts,[15] it devolves into formalism to hold that the mere presence of a public forum will automatically negate every possible perception of endorsement. Instead, this Court should follow the lead of the Second Circuit Court of Appeals which has held that "[t]he existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990).

Moreover, endorsement may occur even though the government maintains an access policy that is neutral with regard to religion. *See Allegheny*, 492 U.S. at 600 n.50 ("Even if the Grand Staircase occasionally was used for displays other than the creche . . . it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government."); *Kiryas Joel*, 114 S. Ct. at 2500 (O'Connor, J., concurring);[16] *cf. Doe v. Village of Crestwood*, 917 F.2d 1476

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[15] The Court's recent public forum cases, often containing multiple opinions, indicate the recurring difficulty in determining whether a public forum exists. *See e.g. ISKCON*, 112 S. Ct. 2701; 112 S. Ct. 2709 (1992); *United States v. Kokinda,* 497 U.S. 720 (1990).

[16] Under Establishment Clause precedent, public school officials are prohibited from providing religious groups access to public school students or permitting instruction in religious alternatives to secular materials. *See Edwards v. Aguillard*, 482 U.S. at 593; *Peloza v. Capistrano Unif. School Dist.*, 37 F.3d 517 (9th Cir. 1994); *Washegesic v. Bloomingdale Pub. Schools,* 33 F.3d 679 (6th Cir. 1994); *Berger v. Renssealear Cent. School Corp.*, 982 F.2d 1160 (7th Cir.), *cert denied*, 113 S. Ct. 2344

(7th Cir.), *cert. denied,* 112 S. Ct. 3025 (1992) (city may co-sponsor secular festival but not one holding a Catholic mass). Again, nothing in *Lamb's Chapel* or *Widmar* suggests the opposite. The appearance that flows from providing live access to individuals for a few hours is quite distinct from that arising through the display of unattended, semi-permanent religious symbols on government property. *Allegheny*, 492 U.S. at 612.[17] For example, while the Establishment Clause would permit a religious figure, like the Pope, to conduct a worship service on the national Mall, *O'Hair v. Andrus*, 613 F.2d 913 (D.C. Cir. 1979), it would not permit that same figure to leave a 36 foot Latin cross in front of the national Capitol for several weeks. There is little doubt that a policy permitting groups to erect long-standing religious and secular symbols on government property would run afoul of the Establishment Clause. *Allegheny,* 492 U.S. at 661 (Kennedy, J., concurring in part in the judgment and dissenting in part); *cf. Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993). And, as the decisions indicate, the appearance of endorsement can occur even though the government does not act with the intent or purpose of doing so.[18]

(1993).

[17] "It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting." *Id.*; *accord Smith,* 895 F.2d at 959; *Kaplan,* 891 F.2d at 1030.

[18] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.").

3. More particularly, the decision below conflicts with the command of *Allegheny* and *Lynch* that courts must examine the entire context of a display to determine whether impermissible endorsement has occurred. The first rule from *Allegheny* is that such cases are fact sensitive; that the constitutionality of a religious display depends upon its "context" and its particular physical setting.[19] The factors the Court considered in *Allegheny* and that have been applied subsequently by federal courts include the character of the symbol(s) involved (religious or cultural),[20] the location and size of the display,[21] the display's physical setting (whether accompanied by secular items),[22] the duration of the display,[23] and whether the display is accompanied by live individuals to whom the speech may be attributed or whether it stands

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[19] Discussion of the importance of examining the context of a display appears in at least nine separate places in the majority opinion in *Allegheny*. 492 U.S. at 595, 597, 598, 600, 606, 616-17, 618, 620. *Accord Lynch,* 465 U.S. at 678-79.

[20] *Allegheny,* 492 U.S. at 598, 613-17; *Gonzales,* 4 F.3d at 1418; *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir.), *cert. denied*, 114 S. Ct. 2707 (1994); *Smith*, 895 F.2d at 955; *Kaplan*, 891 F.2d at 1028-29.

[21] *Allegheny,* 492 U.S. at 599-600; *Small,* 964 F.2d at 629; *Smith,* 895 F.2d at 955, 958; *Kaplan,* 891 F.2d at 1029; *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987).

[22] *Allegheny,* 492 U.S. at 599, 616-18; *Doe v. City of Clawson*, 915 F.2d 244, 245 (6th Cir. 1990); *Smith,* 895 F.2d at 955.

[23] *Allegheny,* 492 U.S. at 607-08, 629 (O'Connor, J., concurring); *Small,* 964 F.2d at 613 n.3; *Smith,* 895 F.2d at 955.

unattended.[24] While the presence or absence of any one of these factors is not necessarily determinative of endorsement nor affects the separate status of the free speech interest, they represent important considerations for determining whether impermissible endorsement has occurred. At best, the existence of a public forum, when considered for endorsement purposes, is germane for determining how a particular site affects the endorsement formula. But the mere fact that speech occurs on public forum cannot address whether other factors lead to perceptions of endorsement. *See Widmar*, 454 U.S. at 273-74.[25] The Sixth Circuit's rigid, *per se* rule, by focusing on only one aspect of a display while ignoring all other factors suggesting endorsement, conflicts with the Court's endorsement rulings. *See Lynch*, 465 U.S. at 678 ("[T]he inquiry calls for line-drawing; no fixed, *per se* rule can be framed.").

4. Finally, the Sixth Circuit's holding too readily equates religious speech with all other forms of speech in a manner that devalues the role of the Establishment Clause. *Amici* agree that religious speech is entitled to free speech protection, *see Heffron v. ISKCON*, 452 U.S. 640 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953), and that symbolic speech generally is afforded the same protection as verbal speech. *See e.g. Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Stromberg v. California*, 283 U.S. 359

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[24] *Allegheny*, 492 U.S. at 599, 612; *Kaplan*, 891 F.2d at 1030.

[25] As example, two circuits have recently found endorsement where private groups erected permanent religious symbols on public property, even though the properties involved were considered public fora. *Gonzales*, 4 F.3d 1412; *Ellis*, 990 F.2d 1518.

(1931). But these principles have their clearest application when the free speech interest stands alone and does not raise Establishment Clause concerns. In certain contexts religious speech and activity are considered unique types of speech and activity and are treated differently by the government. *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (government may fund secular but not religious counseling services); *Lee v. Weisman*, 112 S. Ct. at 2655 (government may not direct or sponsor religious exercises). This distinction between religious and nonreligious speech takes on constitutional significance when government takes steps to support, foster or encourage religious speech. *Allegheny,* 492 U.S. at 600-01. At its core, then, the endorsement test is designed to address this unique quality of religious speech.[26]

Professor Mark Yudof has observed that the Establishment Clause represents "the only substantive constitutional restraint on what governments may say." Yudof, When Government Speaks 214-15 (1983). Although government may speak politically or artistically – and sponsor or fund such activities – it may not do the same with religious speech. In order to maintain this role, the Establishment Clause sometimes inhibits government activity that may contain private speech components. *See Allegheny*, 492 U.S. at 599-601 (noting private group's sponsorship of creche). But this inhibiting role is necessary to effectuate the purposes

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[26] The Sixth Circuit holding also ignores how official and private speech become interrelated and indistinct in many endorsement situations. As Judge Flaum wrote recently in a related case, "[i]n these cases, the line between public and private speech becomes murky, and the speech at issue is not altogether 'private.'" *Doe v. Small,* 964 F.2d at 628 (Flaum, J., concurring in the judgement.).

of the Establishment Clause. As Justice Kennedy has observed, "[t]he First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates . . . . [B]ut the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 112 S. Ct. at 2657-58.[27] The Sixth Circuit decision, however, equates religious speech with nonreligious speech regardless of the context and devalues this important role of the Establishment Clause. As such, it fails to acknowledge the unique quality of religious speech.

For the above reasons, the adoption of a blanket rule regarding private religious speech in a public forum is inconsistent with this Court's public forum holdings as well as those decisions concerning endorsement of religion. The adoption of a such a rule for public forum situations imposes formalism on constitutional adjudication and automatically negates compelling Establishment Clause concerns. It should be rejected as an analytical approach in public fora cases.

B. The Display of Respondents' Cross on Capitol Square, When Viewed in its Overall Context, Results in the Appearance of Endorsement of Religion.

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[27] *Accord Flast v. Cohen*, 392 U.S. 83, 104 (1968) ("The Establishment Clause was designed as a specific bulwark against . . . potential abuses of government power" and "operates as a specific constitutional limitation" on other constitutional provisions.); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479 (1982).

Several factors should lead this Court to find that the display of Respondents' Latin cross in front of the Ohio State Capitol results in the endorsement of the religious message represented by the cross. As a threshold matter, no one can dispute the highly religious character of the Latin cross.[28] The cross possesses none of the supposedly cultural attributes of other religious symbols nor is it commonly identified with a particular seasonal event that has taken on secular characteristics. *Allegheny*, 492 U.S. at 613-18. Its message is blatantly religious.

The overall composition and context of the cross display lead inevitably to a finding of endorsement. The State Capitol and its grounds occupy a prominent location in Columbus and are bordered by major thoroughfares. Respondents' Appendix at RA2, RA31-32. The cross is placed directly in front of and stands in close proximity to the Capitol, which serves as both the symbolic and literal seat of state government. Passers-by thus observe the solitary, unattended cross superimposed on this highly recognizable government building.

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[28] As the Ninth Circuit stated recently, "the Latin cross 'is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.'" *Ellis*, 990 F.2d at 1525 (*quoting Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989)). *See also Gonzales*, 4 F.3d at 1418; *ACLU v. City of St. Charles*, 794 F.2d 265, 271-72 (7th Cir. 1986); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 14-15 (D.D.C. 1988); *ACLU v. Miss. State GSA*, 652 F. Supp. 380, 384 (S.D. Miss. 1987).

This Court and numerous federal courts have identified the situs of important government buildings as being crucial to findings of endorsement. *Allegheny,* 492 U.S. at 599 (identifying the placement of the creche on the "'main' and 'most beautiful part' of the building that is the seat of county government"); *see also Chabad-Lubavitch v. City of Burlington,* 936 F.2d 109, 112 (2d Cir.), *cert. denied*, 112 S. Ct. 3026 (1992); *Smith v. Albemarle County*, 895 F.2d 953, 958 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Kaplan,* 891 F.2d at 1029; *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561, 1566 (6th Cir. 1986); *Creatore v. Town of Trumbull,* No. 3:94CV2143 (D. Conn. Dec. 20, 1994), *aff'd mem.*, (2d Cir. Dec. 22, 1994); *contra Chabad-Lubavitch v. Miller,* 5 F.3d 1383 (11th Cir. 1993).[29] A typical observer would assume the state controls the grounds surrounding the Capitol and would reasonably think that the cross occupies that location with the support and approval of the government. It cannot be disputed that the placement of the cross *at this location* carries even greater probability of endorsement than its erection on some other public park. *Kaplan,* 891 F.2d at 1029 ("the park involved is not any city park, but rather City Hall Park."). Finally, the facts in the instant case suggest that the Respondents expressly sought out

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[29] *See also Doe v. Small*, 964 F.2d at 619 (upholding religious display on public forum "far removed from the seat of government"); *Flamer v. City of White Plains*, 841 F. Supp. 1365, 1368 (S.D.N.Y. 1993) (same). Even the Sixth Circuit is undecided whether to attach any significance to the placement of religious symbols at or near core government buildings. *See Congregation Lubavitch v. City of Cincinnati,* 923 F.2d 458, 459-60 (6th Cir. 1991) (distinguishing *Americans United* by noting that Cincinnati Fountain Square "has no particular connection with any government buildings or functions").

Capitol Square because of its significance as the seat of government and for the symbolic association that would be drawn between the cross and the state government. Petition for Writ of Certiorari at 4. The significance of this location as suggesting endorsement cannot be overstated.[30]

Moreover, the cross stands alone. Unlike the creche in *Lynch* and the menorah in *Allegheny,* the cross is unaccompanied by any secular or neutralizing symbols but stands in stark isolation. Like the creche in *Allegheny,* "nothing in the context of the display detracts from [its] religious message." 492 U.S. at 598. The cross also is not attended by live individuals to whom observers can attribute the cross' religious message. As the Court observed in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 809 (1984), the difference between live speakers and symbolic speech is that in the former situation, "individual citizens [are] actively exercising their right to communicate directly with potential recipients of their message." *Accord Allegheny*, 492 U.S. at 599, 612 (where the Court noted the affect that individuals have toward diffusing appearances of endorsement). By contrast, with unattended religious symbols, no one is available to associate with the message, thus leaving observers to surmise the identity of the speaker. The unattended symbol loses its value as independent speech. This is what distinguishes unattended religious displays from

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[30] Accordingly, *amici* contend that the display of the unattended menorah at the same location is equally invalid. The issue of whether the state may distinguish between types of religious symbols – the menorah and the cross – is not in doubt. Government may not prefer one religion over another; nor may it define one religion's symbol as cultural or seasonal in order to provide it with special access. *Kiryas Joel,* 114 S. Ct. at 2491.

the *Widmar*-type of equal access situations involving live speakers. With no one present to claim authorship or responsibility for the speech, the government becomes the surrogate, the sponsor of the speech.[31]

The duration of the display also suggests government endorsement of the cross' religious message. As proposed in Respondents' application, the cross was to stand for a lengthy period of time (sixteen days) in front of the State Capitol. The semi-permanent nature of the cross highlights the appearance of state endorsement by dominating the forum for an extended period and excluding other speakers. *Accord Doe v. Small*, 964 F.2d at 629 (Flaum, J., concurring). Such appearances of endorsement are especially likely for observers who may pass by the unattended display several times during the sixteen day period.

Finally, the unattended display of inherently religious symbols at core government areas engenders religious divisiveness, the avoidance of which has been a long-standing goal of nonestablishment.[32] Religious divisiveness is a theme

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[31] Because of the other factors suggesting state endorsement of private religious speech, the disclaimer sign is ineffective to negate the endorsement. *Allegheny*, 492 U.S. at 600-01. Moreover, as is evident from photographic exhibit reproduced in Petitioners' Appendix A43, the size and physical make-up of the sign render any disclaimer contained on the sign ineffective to most passers-by.

[32] *See* James Madison's Letter to Thomas Jefferson of August 20, 1785, commenting on the "mutual hatred" between Presbyterians and Episcopalians that was "much inflamed by the late act incorporating the latter." Alley, James Madison on Religious Liberty at 69. *See also* Madison's "Memorial and

that the Court has expressed in its Establishment Clause decisions for many years.[33] As Professor Phillip Johnson has remarked, "[o]ne major objective of the First Amendment is to keep the public peace on religious issues, and one way of doing this is for every religious and antireligious group is to feel that government is neither squarely on its side or squarely on the other side." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 839 (1984). Because religious controversies have the potential to stir animosities, the Court has been wary of government actions that inherently invite divisiveness among religious groups. *See Kiryas Joel,* 114 S. Ct. at 2504 (Kennedy, J., concurring in the judgment); *Lee*, 112 S. Ct. at 2655-56. Moreover, avoidance of religious divisiveness can be seen as another goal of the endorsement test. *Allegheny,* 492 U.S. at 626-27 (O'Connor, J. concurring.). Religious divisiveness is a natural outgrowth of perceptions that government has made religion relevant to a person's standing in the political community. *Id.; accord Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (endorsements "foster the creation of political constituencies defined along religious lines").

Remonstrance" arguing that the general assessment bill "will destroy that moderation and harmony" between religious sects and lead to "animosities and jealousies, which may not soon be appeased." *Id.* at 58-59.

[33] *PEARL v. Nyquist*, 413 U.S. 756, 797-98 (1973) (divisiveness is a "warning signal no to be ignored"); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Walz v. Tax Commission*, 397 U.S. 644, 494 (1970); *McCollum v. Board of Educ.*, 333 U.S. at 217.

The erection of an inherently sectarian symbol such as a cross near an important government building invites religious divisiveness. As Justice Kennedy has recognized, "[t]he urge to use [religious symbols] to teach or taunt is always present." *Allegheny,* 492 U.S. at 678 (Kennedy, J., concurring and dissenting). Nonadherents who perceive a close relationship between the government and the religion represented by the cross may feel that their beliefs are being disfavored and may agitate for similar treatment. And, as occurred in this case, opponents of the symbol's message may resort to vandalism or other violence. Pet. App. A4. As Justice Stevens has observed, there is always a risk that the visible display of a religious symbol "will offend nonmembers of the faith being advertised and well as adherents who consider the particular advertisement disrespectful." *Id.* at 650-51 (Stevens, J., concurring in part and dissenting in part). Instead of achieving ecumenical goals, religious displays tend to emphasize religious differences and "foment . . . disagreements." *Id.*

The potential for religious divisiveness instructs against allowing unattended, solitary religious symbols to be erected at or near important government buildings. Regardless of whether divisiveness is considered an aspect of endorsement or as a complementary test, it is a factor that should be considered when determining if a religious display violates the Establishment Clause.

Considering the entire context of the cross display, its location next to the State Capitol, and the fact that it is an unattended, free-standing religious symbol with no secular or cultural attributes, this Court should find that government endorsement of religion has occurred.

CONCLUSION

For the aforementioned reason, *amici* pray that the Court reverse the decision of the Court of Appeals.

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APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including filing an *amicus* brief on behalf of the petitioners in *Lamb's Chapel v. Center Moriches School District*. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the constitutional principle of church-state separation which, at its core, prohibits government actions that create the appearance of endorsement of religion.

The American Jewish Committee

The Americans Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. These rights and liberties, however, can only be secure for Jews when they are equally secure for Americans of all other faiths. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty for all and has proved of inestimable value to the free exercise of religion in our pluralistic society. In the view of the AJC, display of a Latin cross or menorah or any comparable religious symbol in a public area represents official

endorsement of a religious message that violates the Establishment Clause of the First Amendment.

People For The American Way

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning freedom of expression and separation of church and state. As in the *Lamb's Chapel* decision, People For believes that both the Free Speech Clause and the Establishment Clause of the First Amendment must be applied in situations like this one concerning religious expression and activities involving government and public forums. People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principle that the "no-endorsement" standard should continue to be utilized in evaluating the constitutionality of religious expression on government property.

The Union of American Hebrew Congregations (UAHC)

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be

among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state, and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

Americans Civil Liberties Foundation of Vermont

Americans Civil Liberties Foundation of Vermont, Inc., is a state affiliate of the American Civil Liberties Union, a national organization dedicated to preserving the principles embodied in the Bill of Rights. ACLF of Vermont has sponsored three cases in the last ten years which have asserted that the display of an inherently religious symbol in a public area, closely associated with government, represents official endorsement of religion and thus violates the Establishment Clause. The decision of the court of appeals below conflicts with the holdings of two of these cases, *Chabad-Lubavitch v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), and *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989).